

tion. It follows that if the Act does not provide for compensation, the Act must be invalid being in conflict with Article 31(2).

It is interesting to note that in that case question arose as to whether the test of validity should be under the original Article 31 or under the new Article (with clause 2(A)). The amendment to the Constitution by the introduction of a new clause 2(A) to Article 31 by the Constitution (Fourth Amendment) Act, 1955 came into effect on April 27, 1955. It came three days too late to affect the decision of the court in that case.

The cases in India show quite clearly that persons may be considered to have been deprived of his property as a result of his property having been acquired or taken into possession by the State. This is so even though there has been no actual acquisition or taking over of property by transfer of ownership of that property to the State or other statutory bodies controlled by the State. In order to overcome the difficulty created by consensus of judicial decisions the Constitution was amended by the Indian Government who at that time intended to nationalise certain economic activities.

Clause 2(A) was added to Article 13 of the Constitution by the Constitution (Fourth Amendment) Act, 1955. It reads:—

"Where a law does not provide for the transfer of the ownership or right of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property notwithstanding that it deprives any person of property."

There is no equivalent to clause 2(A) in our Constitution. We must, therefore, compare our constitutional provisions to similar provisions in India before the Constitution (Fourth Amendment) Act, 1955. That is to the position in India before April 27, 1955.

Although our Article 13 is not word for word similar to Article 31 of the Indian Constitution, the substance is parallel. There is no reason why the construction based on Article 31 before clause 2(A) was added, by the Supreme Court of India should not be adopted in respect of our Article 13. Accordingly, under Article 13 a person may be deprived of his property if a mere negative or restrictive provision results in interfering with the enjoyment of his property without any actual acquisition or taking over of property by the State or statutory bodies under the control of the State.

In the light of the authorities, I would hold that as section 35A does not provide adequate compensation for depriving appellants of property it is in conflict with Article 13 of the Constitution. The appellants shall be entitled to the declaration to the effect that appellants are entitled to compensation for the goodwill of their business which had been compulsorily acquired by the second respondent.

The appeal is allowed with costs.

Ali F.J. concurred.

Appeal allowed.

Solicitors: K. Y. Foo & Co.; Tunku Zuhri, Manan & Abdullah.

PORT SWETTENHAM AUTHORITY v. T.W. WU AND COMPANY (M) SDN. BHD.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) March 8, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 111 of 1974]

Contracts — Bailment — Duties and responsibilities of bailee — Loss of goods after they were unloaded at wharf — Whether port authority liable — Burden of proof — Evidence Act, 1950, s. 106 — Contract Act, 1950, ss. 104 and 105.

Port Authority — Bailee — Limitation of liability — Kelang Port Authority Bye-laws 1965, Bye-law 91(1) — Port Authorities Act, 1963, s. 29.

This was an appeal from the judgment of the High Court ([1975] 1 M.L.J. 15). The facts adduced showed that 93 cases of pharmaceutical goods had been unloaded at Port Klang and kept in the custody of the Port Swettenham Authority. Subsequently only 29 cases were collected by the respondents. Subsequently part of the missing goods were recovered in shops in Kuala Lumpur. The respondents brought an action for breach of contract and/or conversion of the remaining 64 cases. It was held that the appellants, the port authorities, were liable as they had failed to show that they had exercised due care and diligence. The appellants appealed.

Held, dismissing the appeal: (1) in cases where the bailor and bailee relationship has been established all that the plaintiff has to do is to prove that he entrusted the goods to the defendant who could not deliver them on demand. It would then be for the defendant as bailee to show that the loss was not due to his negligence;

(2) in this case the learned judge was correct in holding that the appellants were negligent considering the circumstances under which the goods disappeared, the nature, bulk and weight of the goods and the system of security;

(3) Bye-law 29 of the Port Swettenham Authority Bye-laws did not affect the onus of proof but only dealt with limitation of liability.

Cases referred to:—

- (1) *General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* [1963] 1 W.L.R. 644, 648.
- (2) *Joseph Travers & Sons Ltd. v. Cooper* [1915] 1 K.B. 73.
- (3) *Phipps v. The New Claridge's Hotel Ltd.* (1905) 22 T.L.R. 49.
- (4) *J. Spurling Ltd. v. Bradshaw* [1956] 2 All E.R. 121, 125.
- (5) *Dwarka Nath Pai Mohan Chandhuri v. Rivers Steam Navigation Co. Ltd.* A.I.R. (1917) P.C. 173; (1918) 46 I.C. 319, 321.
- (6) *Secretary of State v. Ramdhan Das Dwarka Das* (1934) 150 I.C. 189.
- (7) *Coggs v. Bernard* (1703) 2 Ld. Raym. 909.
- (8) *Abdul Rahman v. Ariffin* [1956] M.L.J. 89.
- (9) *Gee Hup & Co. v. Yeo Swee Hern Trading as Chop Yong Pee Huat* [1935] M.L.J. 66.
- (10) *Mackenzie v. Cox* 173 E.R. 987.
- (11) *Coldman v. Hill* [1919] 1 K.B. 443.
- (12) *Sharikat Lee Heng Sdn. Bhd. v. Port Swettenham Authority* [1971] 2 M.L.J. 27.
- (13) *Yong Tong Hong v. Siew Soon Wah & Ors.* [1971] 2 M.L.J. 105.
- (14) *Hajara Singh v. Muthukaruppan* [1967] 1 M.L.J. 167.
- (15) *Lee Ah Low v. Cheong Lip Kien* [1970] 1 M.L.J. 7.
- (16) *T.O. Thomas v. K.C.I. Reddy* [1974] 2 M.L.J. 87.
- (17) *Nagappa Rengasamy Pillai v. Lim Lee Chong* [1968] 2 M.L.J. 91.
- (18) *Hunt & Winterbotham Ltd. v. B.R.S. (Parcels) Ltd.* [1962] 1 Q.B. 617, 634.
- (19) *Brooks Wharf and Bull Wharf Ltd. v. Goodman Brothers* [1937] 1 K.B. 534.

- (20) *British Traders & Shippers Ltd. v. Ubique Transport & Motor Engineering Co. (London) Ltd. and Port of London Authority* [1952] 2 Lloyd's L.R. 236, 256.
- (21) *Malayan Thread v. Oyama Shipping Line Ltd. & Anor.* [1973] 1 M.L.J. 121, 123.
- (22) *Cheshire v. Bailey* [1905] 1 K.B. 237.
- (23) *Morris v. Martin* [1966] 1 Q.B. 716, 728.
- (24) *Lloyd v. Grace Smith & Co.* [1912] A.C. 716.
- (25) *United Africa Co. Ltd. v. Saka Owoade* [1955] A.C. 130.
- (26) *Reg. v. Leong Bros. & Co. Ltd.* [1961] S.C.R. 189; 26 D.L.R. 760.
- (27) *British Road Services Ltd. v. Arthur V.T. Crutchley & Co. Ltd.* [1968] 1 Lloyd's L.R. 271, 288.
- (28) *Bullock v. The London General Omnibus Co. & Ors.* [1907] 1 K.B. 264.

FEDERAL COURT.

J. Puthuchear for the appellants.

C. W. M. Abraham for the respondents.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal by appellants from a judgment of Abdul Hamid J. ordering them to pay a sum of \$21,236.84 damages to respondents for the loss of 64 cases of pharmaceutical goods while in the custody of appellants. There are four grounds of appeal, namely, that the learned judge erred:—

- (i) in law in holding that by-law 91(1) of the Kelang Port Authority Bylaws 1965 does not relieve the appellants of the burden of proof that ordinarily lies upon a bailee in such circumstances;
- (ii) in law in holding that the appellants were liable on the grounds that the theft took place as a consequence of either the negligence or the active participation or complicity of one or more of the port employees;
- (iii) in holding that the care taken by the appellants of the respondents' goods was insufficient to satisfy the duty of care placed on the appellants by section 104 of the Contracts (Malay States) Ordinance, 1950;
- (iv) in awarding the first defendant costs against the appellants.

The first and third grounds may be taken together as both are concerned with the question of burden of proof. The second ground seems to question inferences made by the learned judge from facts. The last ground refers to costs awarded to first defendants who are not parties to this appeal.

Respondents were consignees of 93 cases of pharmaceutical goods from Hongkong which were carried by S.S. "Sansei Maru" pursuant to two Bills of Lading. The vessel arrived at Port Kelang on 5th April, 1970. The goods were unloaded, tallied and taken away by appellants' forklift and kept in Shed No. 8. The goods were examined by customs and duty was duly paid. Through their forwarding agents respondents managed to collect only 29 cases. Appellants were informed in writing on April 15, 1970 of the short delivery of 64 cases. In reply, appellants stated that according to their outturn the 64 cases were shortlanded. On July 20, 1970, acting on information received, respondents lodged a report with the police concerning the

A missing goods. As a result police raided the premises of Kuala Lumpur Pharmacy Sdn. Bhd. where part of the missing goods were recovered. The proprietor of the said firm was charged in court but subsequently discharged.

Before going into the grounds of appeal, we would deal with one matter raised by appellants. Encik Puthuchear referred to the pleading and said that detainee was not pleaded. He said that was important in determining onus of proof. The reason is that the onus on a bailee arises when a bailor demands the goods and is refused. He argued that the bailor should frame his action in detainee. He raised this point because the learned judge had placed the onus on appellants as bailees. As far as we can see from the statement of claim respondents based his claim on contract (paragraph 5), detainee (paragraph 6), negligence (paragraph 9) and conversion (paragraph 12). In any case Encik Abraham said that since the goods were already missing there would be no point in their proceeding in detainee because it would mean asking for the return of the goods. They could rely on other parts of their pleading. It is sufficient to say that the case of *General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.*⁽¹⁾ was cited, particularly the judgment of Lord Diplock, merely to show the distinction between detainee and conversion. In common law the onus of proof is on the bailee to show that the loss of, or damage to, the goods entrusted to him occurred without negligence or default on his part. This is so notwithstanding the exercise by him of that degree of care and diligence which the nature and contract of bailment required of him. See *Joseph Travers & Sons Ltd. v. Cooper*,⁽²⁾ *Phipps v. The New Claridge's Hotel Ltd.*⁽³⁾ We do not think there is much in what Encik Puthuchear said. As Denning L.J., as he then was, in *J. Spurling Ltd. v. Bradshaw*⁽⁴⁾ said:—

"A bailor, by pleading and presenting his case properly, can always put the burden of proof on the bailee. In the case of non-delivery, for instance, all he need plead is the contract and a failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law) or, if the loss was due to his fault, that it was a fault from which he is excluded by the exempting clause."

He continued in another passage:—

"Where, however, the only charge made in the pleadings — or the reasonable inference on the facts — is that the damage was due to negligence and nothing more, then the bailee can rely on the exempting clause without more ado."

H The main question in this appeal is concerned with the burden of proof. Was the learned judge right to place the burden on appellants in the circumstances to prove that the loss of the goods was not caused by negligence on their part?

I There can be no doubt that on the evidence the goods were delivered to appellants. This was also the finding of the learned judge. The loss of the cases of pharmaceutical goods was established. Part of the missing goods was found in the premises of the Kuala Lumpur Pharmacy Sdn. Bhd. As the goods were entrusted to appellants they were dutybound to take all reasonable precautions to protect them from theft, loss or damage. Because of their special knowledge

the burden is on them. Section 106 of the Evidence Act provides that:—

"When any fact is especially within the knowledge of any person the burden of proving that fact is upon him."

One important aspect of the burden of proof was strenuously argued by the parties. Encik Puthucheariy contended that section 106 did not in any way shift the onus of proving negligence to appellants. All that section 106 required of appellants was for them to show what had been done to protect the goods. They had given evidence regarding system and security. It was for respondents to show where appellants as bailees had failed in the care of a man of ordinary prudence. *Dwarka Nath Pai Mohan Chaudhuri v. Rivers Steam Navigation Co. Ltd.*⁽⁵⁾ was cited and certain passages were quoted.

The argument on onus centres round the provisions of sections 104 and 105 of the Contracts (Malay States) Ordinance, 1950 and by-law 91(1) of the Port Swettenham Authority By-laws 1965. Sections 104 and 105 read as follows:—

"104. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed."

"105. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104 of this Ordinance."

By-law 91(1) provides that:—

"The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or from other cause unless such loss or destruction has been caused solely by the misconduct or negligence of the Authority or its officers or servants."

It is the contention of the appellants that by-law 91(1) has the effect of decreasing the liability of the Authority and that the onus is on respondents to show that the loss was caused solely by the misconduct or negligence of the Authority or its officers or its servants. Further, the duty which rests upon a bailee under section 104 is no different from the duty cast by the common law on a gratuitous bailee. That the duties of a bailee for reward are the same as those of a gratuitous bailee under the Indian Contracts Act has been long recognised in India. In *Secretary of State v. Ramdhan Das Dwarka Das*⁽⁶⁾ the Privy Council considered the duty of care to be taken by a bailee under section 151 of the Indian Contracts Act (which is in *pari materia* with our section 104). After commenting on the English cases on bailments their Lordships went on to say:—

"The Indian legislature in section 151 Contract Act, makes no reference to the distinction between a gratuitous bailee and a bailee for hire, and, omitting all reference to skill, lays down for both one standard, namely, as much care as a man of ordinary prudence would take of his own goods in similar circumstances. The standard, therefore, must, while it is one and the same so far as it is a question of principle, cannot be formulated by an inflexible practical rule applicable to all cases."

They very wisely gave this warning when dealing with English authorities:—

"To show what the standard ought to be, a number of English authorities have been cited before us on behalf of the appellant. These authorities it must be admitted are not always

A consistent, and moreover they have to be, if at all, relied on with great caution, in view of the difference that exists between the two systems of law."

Reference was made to *Pollock & Mulla on Indian Contract and Specific Relief Acts, 6th Edition, page 516*, particularly the commentary on section 151 which reads:—

B "This section abolishes the distinctions in the amount of care required of various kinds of bailees which were established, or supposed to be established, by the judgment of Holt, C.J. in *Coggs v. Bernard*.⁽⁷⁾ By modern English law a gratuitous bailee is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description; and it does not seem that in practice an ordinary bailee for reward is bound to anything more."

C It was submitted that in Malaysia as in India the duty imposed by law on a bailee for reward is the same as that imposed by common law on a gratuitous bailee.

On the other hand, Encik Abraham says that although our law does not expressly distinguish between a gratuitous bailee and a bailee for reward, in so far as onus of proof of a bailee for reward is concerned, the burden of proof in our law is the same as the burden of proof of a bailee for reward in the common law. In support of this two Malaysian cases were cited. The first is *Abdul Rahman v. Ariffin*.⁽⁸⁾ It concerned a claim for the value of a buffalo which plaintiff had entrusted to defendant in accordance with a profit sharing agreement. The learned magistrate considered that there was a contract of bailment of the buffalo but held that as plaintiff had not established that the loss of the buffalo was through the neglect or default of the defendant, the bailee, he had no cause of action. On appeal, Thompson J., as he then was, held that the onus was on the defendant as bailee to show that the loss was not attributable to lack of care on his part and, therefore, the learned magistrate was wrong in giving judgment for the defendant at the close of the case for the plaintiff. Part of his short judgment reads:—

"I do not find it necessary to discuss the point at great length because in my opinion the law is clearly stated in the following passage from *Chitty on Contracts, 20th Edition, page 846*:—

G "In the case of loss or damage to goods bailed the onus is on the bailee to show that the loss or damage was not attributable to any lack of care which by law is required of him."

After mentioning the case of *Phipps v. The New Claridge's Hotel Ltd.*⁽⁹⁾ where the facts were similar to the case he was considering he continued:—

H "There is nothing inconsistent between the law as thus stated in *Chitty* and sections 104 and 106 of the Contracts Ordinance. The point is more one of onus than one of substantive law. It is true that the bailee is only responsible for the consequences of failure to observe the standard of care laid down by section 104 and there is no doubt that up to a point there is an onus upon any plaintiff which must be discharged. It seems to me, however, that once loss has been proved that onus has been discharged and the onus then shifts to the defendant to shew that the loss occurred in circumstances which shewed no lack of care on his part."

I The second case is *Gee Hup & Co. v. Yeo Swee Hern trading as Chop Yong Pee Huat*.⁽⁹⁾ There plaintiffs regularly sent quantities of uncured rubber to defendant owners of a smokehouse, for smoking at an agreed price. As a result of a fire the smokehouse

and adjoining buildings, the contents therein including plaintiffs' uncured rubber were destroyed. Thorne J. expressed the view that as plaintiffs had alleged negligence against defendant they had to adduce evidence to establish a *prima facie* case of negligence in order to shift the onus to defendants. After hearing all the evidence he found for plaintiffs holding that plaintiffs had established that defendants were negligent. Although the appeal was dismissed, Huggard C.J. criticised the view expressed by Thorne J. He made clear that he agreed with the principle established by those cases arising out of tort on the question of onus in that plaintiff was to prove that defendant was negligent and that the negligence was the proximate cause of the loss or injury complained of. Having said that he made these observations:—

"But in my view the principle established by this line of cases has no application to the facts in the present case. It is, I think, quite clear that the defendants here were bailees for reward of the plaintiff's rubber, and therefore what we have to consider is the legal position applicable to the relationship of bailor and bailee for reward."

He then referred to sections 151 and 152 of the Contract Enactment of the Federal Malay States which were substantially the same as the provisions of the Indian Contract Act and cited *Pollock & Mulla, 5th Edition*, particularly a passage which is the same as in the 9th Edition and quoted in a later part of this judgment. Continuing on he said:—

"Now the common law of England as to bailments is substantially the same as the statute law on that subject in force in this State. It is therefore of assistance to turn to English authorities dealing with the subject."

The following general proposition appears in *Halsbury Laws of England*, 2nd Edition, Volume 1 at page 751:—

"When a chattel intrusted to a custodian is lost, injured or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his property."

This proposition is supported by ample authority amongst the cases cited being:—

Mackenzie v. Cox⁽¹⁰⁾; *Phipps v. New Claridge's Hotel (Ltd.)*⁽³⁾ and *Coldman v. Hili*⁽¹¹⁾."

Section 104 clearly lays down the duty and responsibility of a bailee. Section 105 merely deals with special contract. Encik Puthuchearry submitted that by-law 91(1) could be regarded as analogous to a special contract. We do not think that is possible in this case. The Port Swettenham Authority By-laws, 1965 was made pursuant to section 29 of the Port Authorities Act, 1963. Paragraph (g) of section 29(1) reads:—

"29(1) The authority may with the approval of the Minister make by-laws for....

(g) limiting the liability of the authority in respect of any loss, damage or injury to any person, occurring without the actual fault or privity of the authority (whether in any vessel operated or maintained by them or on any wharf, quay or other part of the port);"

Section 29 merely empowers the appellants to limit liability so that the authority would be only liable if they are at fault. It in no way gives appellants power to exempt themselves totally from liability. The By-laws would be *ultra vires* if they purported to deal with matters outside the ambit of section 29.

Part IV of the Port Swettenham Authority By-laws, 1965 covers By-laws 90 to 117 and deals specifically with limitation of liability. By-law 91(1) has nothing whatsoever to do with onus of proof or shifting of onus of proof. Once it is established from the evidence that appellants were at fault, then, as H. T. Ong C.J. said in *Sharikat Lee Heng Sdn. Bhd. v. Port Swettenham Authority*⁽¹²⁾ "the onus as a determining factor, therefore, did not arise." *Lee Heng's case*⁽¹²⁾ being a decision of this court is binding on this court unless it can be shown to be *per incuriam*. Thus, the Federal Court in *Yong Tong Hong v. Siew Soon Wah & Ors.*⁽¹³⁾ did not follow *Hajara Singh v. Muthukaruppan*⁽¹⁴⁾ and *Lee Ah Low v. Cheong Lip Kien*⁽¹⁵⁾ and similarly in *T. O. Thomas v. K. C. I. Reddy*⁽¹⁶⁾ the Federal Court did not follow *Nagappa Rengasamy Pillai v. Lim Lee Chong*⁽¹⁷⁾ as it was considered that the earlier decisions were given *per incuriam*. It could be on the ground that a point was not fully argued either because (a) certain law, rule or regulation, or (b) certain authority or authorities had not been brought to the attention of the court. However, the same cannot be said of *Lee Heng's case*⁽¹²⁾. By-law 91(1) was thoroughly canvassed in that case. The learned judge rightly pointed out that *Lee Heng's case*⁽¹²⁾ made clear that By-law 91(1) did not relieve the Port Authority of the burden of proof that ordinarily rested upon a bailee. In this case respondents averred that appellants as bailees were negligent and on the evidence the learned judge was satisfied that the 64 cases of pharmaceutical goods were stolen while in the custody of appellants. After referring to what Denning L.J. said in *Spurling v. Bradshaw*⁽⁴⁾ in *Lee Heng's case*⁽¹²⁾ H. T. Ong C.J. continued:—

"Mere non-delivery, therefore, is *prima facie* evidence of negligence — this being a case of *res ipsa loquitur*. And 'once negligence on the part of the defendants has been established and this negligence could have caused the loss,' it was eminently reasonable to ask them to prove that in fact it did not: see *Hunt & Winterbotham Ltd. v. B.R.S. (Parcels) Ltd.*⁽¹⁸⁾ per Donovan, L.J. who went on to say —

"Similarly, in *Brooks Wharf and Bull Wharf Ltd. v. Goodman Bros.*⁽¹⁹⁾ (another case of a claim in negligence) it was held that the circumstances of the loss of goods by a bailee may justify the inference of negligence as the cause of the loss, which inference it would be for the bailee to displace."

Dwarka Nath's case⁽⁵⁾ was not mentioned by H. T. Ong C.J. in *Lee Heng's case*⁽¹²⁾ although his attention was drawn to the case. This is understandable because *Dwarka Nath's case*⁽⁵⁾ dealt with an entirely different kind of case. It was concerned with a suit against common carriers for loss of goods occasioned by fire which originated from some unknown cause. This is stated very clearly in *Pollock & Mulla on the Indian Contract and Specific Relief Acts, 9th Edition*, page 666 when referring to *Dwarka Nath's case*, that:—

"There is a special class of cases where goods are destroyed by fire arising from some unknown cause, while they are in the possession of a common carrier or a railway company."

In so far as burden of proof on a bailee is concerned the position in India is stated in the same edition of *Pollock & Mulla* at page 665 as follows:—

"In cases governed by the provisions of sections 151 and 152, the loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee."

At page 659 under the heading of Common Carriers it is stated:—

"The provisions of sections 151 and 152 of the Contract Act embody in effect the Common Law rule as to the liability of bailees other than common carriers and innkeepers. The measure of care required of these bailees in respect of goods entrusted to them was the same as a man of ordinary prudence would take of his own goods; in other words, the liability was one for negligence only, in the absence of special contract. Common carriers and innkeepers, on the other hand, were liable as insurers of goods; that is, they were responsible for every injury to the goods occasioned by *any means whatever*, except only the act of God and the King's enemies."

To recapitulate the weight of authorities indicates that our law regarding onus on bailee for reward is not inconsistent with the common law. In the ordinary cases of tort the onus would be on the plaintiff to prove that defendant was negligent and that the act or omission was the proximate cause of the loss or injury. But, in cases where the bailor and bailee relationship has been established then all that the plaintiff has to do is to prove that he entrusted the goods to defendant who could not deliver them on demand. It would then be up to the defendant as bailee to show that the loss was not due to his negligence. The fact that the appellants had devised a good system did not render them any the less liable if it was not shown that the loss of the goods arose otherwise than through their negligence. Appellants did not tell the court anything at all as to what happened to the 64 cases of goods which were delivered to them in Shed No. 8. It would not help to say that the goods were shortlanded or to give speculative evidence when it was established on preponderance of probabilities that the goods were conveyed by their employees and kept in their custody. They could not explain how the bulky and heavy goods could be taken out of the shed under the watchful eyes of their employees.

We should like to refer to *British Traders & Shippers Ltd. v. Ubique Transport & Motor Engineering Co. (London) Ltd. and Port of London Authority*⁽²⁰⁾ where Lord Justice Morris said:—

"In the case of *Brooks Wharf & Bull Wharf Ltd. v. Goodman Bros.* (1936) 54 Ll.L. Rep. 147; (C.A.) 56 Ll.L. Rep. 71; [1937] 1 K.B. 534, a case decided by Mr. Justice Branson which went to the Court of Appeal, Lord Wright, M.R. in his judgment in the Court of Appeal (at pages 73 and 538 of the respective reports) made certain citations, and he quoted a passage from the judgment of Lord Loreburn in *Morrison, Pollexfen & Blair v. Walton* (unreported), Lord Wright said:—

"The law as to the position of warehousemen in such circumstances and the extent of the duty of care which rests upon them has been discussed in various cases, but I proceed on the basis of the statement of the law on the liability of warehousemen contained in two passages from the judgments of the House of Lords in the unreported case of *Morrison Pollexfen & Blair v. Walton* quoted by Lord Justice Kennedy in *Joseph Travers & Sons Ltd. v. Cooper* [1915] 1 K.B. 73 @ 90. The first passage so quoted from the judgment of Lord Loreburn is in the following words."

I do not read all the passages, but the concluding sentences are these:—

"It is, for him (warehouseman) to explain the loss himself, and if he cannot satisfy the court that it occurred from some cause independent of his own wrong-doing he must make that loss good."

And Lord Halsbury had said in *Morrison, Pollexfen & Blair v. Walton* (unreported):—

"It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the

A bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him."

The learned judge was at pains to show that by-law 91(1) did not shift the onus in any way or exempt appellants from the burden of proving that they were not negligent. Appellants took the line that they did take reasonable precautions to protect the goods in their custody by showing system of protection and adequacy of security. In *Malayan Thread v. Oyama Shipping Line Ltd. & Anor*⁽²¹⁾ the learned judge there was presented with more materials and also, if we remember correctly, security was then in the Port's charge. For instance, the shed clerks, delivery clerks and other port personnel besides evidence similar to those given by DW1 and DW2 were adduced. The decision in that case was, therefore, based on the particular facts of the case.

More is required than merely adducing evidence to show that their system was impeccable and their security adequate. If their system and security were so good then such bulky and heavy goods from the shed could not have escaped the vigilance of their employees bearing in mind that they were supposed to be working in shifts round the clock. In this case the learned judge was entitled to hold that on the evidence appellants had not discharged the onus which rested on them.

E In many respects the case of *British Traders & Shippers Ltd. v. Ubique Transport & Motor Engineering Co. (London) Ltd. and Port of London Authority*⁽²⁰⁾ is similar to our case except that the missing goods were never located or found. There plaintiffs claimed damages against defendants for negligence and conversion or detainment in respect of the loss of 5 tons of corrugated metal sheets. Defendants denied liability. But, second defendants also pleaded alternatively that if the sheets were delivered to them they were exempted from liability (1) by the Owner's Risk clause in that goods were "unprotected" or "unpacked", and (2) by their conditions relating to liability as to goods warehoused, which provided:—

G "The Port Authority take all reasonable measures to protect goods received by or landed, warehoused or deposited with them against loss or damage, but they do not accept liability for any loss or damage arising otherwise than through their negligence."

It was held that the first defendants as carriers had discharged the onus of showing that they had delivered the steel sheets to second defendants and that the onus was on second defendants to show that the loss occurred without their negligence. It was also held that they were not exempted from liability either by (1) the Owner's Risk clause as the steel sheets were neither "unprotected" nor "unpacked", or (2) their conditions relating to liability as to goods warehoused. Accordingly, as second defendants failed to show that the loss occurred otherwise than through their negligence, plaintiff's claim against them succeeded. As to costs a Bullock order was made.

I Encik Puthuchear submitted there was no evidence of theft by any named servants and if someone was in complicity with the thieves, those facts would not be enough to make the master liable vicariously. All that was required of appellants under section 104

was the degree of care that a man of ordinary prudence would take of his own goods in similar circumstances. Further, by By-law 91(1) appellants had contracted into a lower duty of care. If an analogy to common law duty was to be drawn then it was submitted that duty would be that of a gratuitous bailee which the Contracts (Malay States) Ordinance 1950 had imposed.

The Port Swettenham Authority could not function except through individuals who are their servants or employees. Appellants did not try to contradict the evidence adduced by respondents because Encik Puthuchearly frankly admitted they did not know whether the missing goods were ever in their possession. Something must be wrong with their system which they spoke so highly of, if they could say they did not know anything of goods proved to have been delivered to their custody. In this case it was established that 93 cases were taken by appellants' forklift to Shed No. 8 and 29 cases were delivered, but 64 cases apparently disappeared from that shed under the noses of those employees working round the clock in the shed and at the gate. Part of the goods were found in a local pharmacy. All these showed that their system was not as impeccable as they wanted the court to believe. Neither was their security adequate.

Encik Puthuchearly argued that *Malayan Thread's* case⁽²¹⁾ relied on *Cheshire v. Bailey*⁽²²⁾ for the proposition that a master was not responsible for the fraudulent act of his servant or the loss of goods was not referable to the employees' negligence since the loss was caused by an act outside the scope of the servant's employment. The learned judge distinguished the facts in *Malayan Thread's* case⁽²¹⁾ from the facts he was considering and also in that case *Morris v. Martin*⁽²³⁾ which disapproved *Cheshire v. Bailey*⁽²²⁾ was not considered.

In *Morris v. Martin*⁽²³⁾ the theft was committed by the very servant who was entrusted by the bailee to clean the fur. The County Court held that the bailee was not liable for the theft of the servant whose act was not "in the scope of his employment". In allowing the appeal the Court of Appeal held that the bailees owed the owner of the fur the duties of a bailee for reward to take reasonable care of the fur and not to convert it. Lord Denning M.R. observed:—

"... when a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then if he entrusts that duty to a servant or agent he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them or makes away with them. It follows that I do not think that *Cheshire v. Bailey*⁽²²⁾ can be supported."

Encik Puthuchearly referred the court to section 3(1)(a) of the Civil Law Ordinance, 1956 which reads:—

"3. (1) Save so far as other provision has been made or may hereinafter be made by any written law in force in Malaysia the court shall—

(a) In West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956."

A He argued that *Morris v. Martin*⁽²³⁾ was decided on May 17, 1965 and till then *Cheshire v. Bailey*⁽²²⁾ was the common law of England. *Morris v. Martin*⁽²³⁾ might be the correct common law rule regarding master's liability for servant's tort but it was not the common law administered in England on April 7, 1956. Therefore, section 3(1)(a) prohibits its reception.

B *Cheshire v. Bailey*⁽²²⁾ clearly conflicts with *Lloyd v. Grace, Smith & Co.*⁽²⁴⁾ which rejected the view that a dishonest act committed by a servant for his own benefit was outside the scope of his employment. Although the House of Lords did not say it had overruled *Cheshire v. Bailey*⁽²²⁾ clearly it must be taken to have impliedly overruled it. Even the Privy Council did not follow *Cheshire v. Bailey*⁽²²⁾. As Lord Diplock remarked at page 736:—

C "As recently as 1955 the Privy Council in *United Africa Co. Ltd. v. Saka Owoade*⁽²⁵⁾ although they reached a decision in conflict with *Cheshire v. Bailey*, declined to express a view as to whether it had been overruled by *Lloyd v. Grace, Smith & Co.*⁽²⁴⁾ or could be distinguished from it. In the present case, we, I think, are compelled to make up our minds about this. For my part I find it impossible to reconcile the decision in *Cheshire v. Bailey*⁽²²⁾ with the principles laid down in *Lloyd v. Grace, Smith & Co.*⁽²⁴⁾ I think that decision is no longer good law and is not binding upon us. In so holding I am reassured by the reflection that this branch of the common law in England will be the same as it has been held to be in Ontario by the Supreme Court of Canada (see *Reg. v. Levy Bros. & Co. Ltd.*⁽²⁶⁾) and as it has been held to be in Nigeria by the Privy Council (*United Africa Co. Ltd. v. Saka Owoade*⁽²⁵⁾). It is better that the common law in different common law countries should converge rather than grow apart."

D *Morris v. Martin*⁽²³⁾ merely brings to light what should have been the common law. *Cheshire v. Bailey*⁽²²⁾ and *Lloyd v. Grace, Smith & Co.*⁽²⁴⁾ cannot both be right. We must substitute commonsense for technicality. There is nothing to prevent this court from saying that the common law of England regarding a master's liability for a servant's tort is correctly laid down by the House of Lords in *Lloyd v. Grace, Smith & Co.*⁽²⁴⁾ which impliedly overruled *Cheshire v. Bailey*⁽²²⁾. The Privy Council in *United Africa Co. Ltd. v. Saka Owoade*⁽²⁵⁾ also did not follow *Cheshire v. Bailey*⁽²²⁾. So that the common law of England was as stated by *Lloyd v. Grace, Smith & Co.*⁽²⁴⁾ and not *Cheshire v. Bailey*⁽²²⁾.

E Sections 104 and 105 read with By-law 91(1) in no way reverse the onus of proof which rested squarely on appellants as bailees for reward. They have nothing to do with the burden of proof. To decide on whom the burden rests one must look to our law of evidence and decided cases. Even in *Secretary of State v. Randham Das*⁽⁶⁾ their Lordships in the Privy Council realised the impracticability of having one standard of care for a gratuitous bailee and a bailee for reward. Hence, they said that although the standard was one and the same so far as the question of principle was concerned the standard could not be formulated by an inflexible practical rule applicable to all cases. It is, therefore, the practical aspect that one must look into. In this type of cases a bailee would only be able to adduce evidence of delivery, demand and refusal. He would be in no position to obtain evidence to show what actually happened to the goods which were in the custody of the Port Authority. Since the goods were in the care and control of the Port Authority,

it was, therefore, reasonable that the Port Authority should explain the loss as the matter was something within their own knowledge. *Abdul Rahman's case*,⁽⁸⁾ *Gee Hup's case*⁽⁹⁾ and *Lee Heng's case*⁽¹²⁾ are clear authorities for the proposition that the onus of proof on a bailee for reward in this country is the same as that of the common law.

Much more detailed evidence on system was given in *British Traders' case*⁽²⁰⁾ but Lord Justice Morris accepted the evidence of the driver that he did in fact deliver the steel sheets to the Port of London Authority. In our case only two witnesses gave evidence on system and security when the missing goods were proved to be in their custody. Not a single word was uttered about the particular missing goods and what happened to them in their evidence.

It was submitted on behalf of appellants that they had discharged the burden which rested upon them merely by showing system and security. The learned judge did not think so and he was right too. The Port of London Authority in *British Traders' case*⁽²⁰⁾ also could not explain at all what happened to the goods deposited with them. All they did was to show that they had devised and evolved a good system for the protection of the goods kept by them. In holding that this was not good enough, Lord Justice Morris said:—

"But, furthermore, the Port of London Authority cannot say whether these goods were stolen or not, and if they were stolen they cannot say whether they were stolen by some intruder or by some of their servants. The matter is a complete mystery and it would be wrong and idle to speculate as to what did happen. Anyone may suggest in his own mind a series of possibilities, but it would be idle and wrong to formulate them, for there is no reason to think that anyone is more likely than any other; but I am satisfied that it is not shown in this case that the loss of the goods arose otherwise than through the negligence of the Port of London Authority."

In our case the goods were clearly stolen as some found their way to a local pharmacy. Appellants took no active steps to investigate into the matter but chose the easy way out by holding stubbornly to the view that the goods were shortlanded because in their experience it usually happened to consignment which was big. The learned judge could not but find the appellants negligent considering the circumstances under which the goods disappeared, the nature, bulk and weight of the goods, and the system of security. We are not at all surprised that he should make the following comments:—

"Although goods leaving the port area are supported by proper documents delivery of the goods at the shed and the checking at the gate is all done by port employees. It may be pertinent to observe that in view of the nature of the goods, their weight and bulk, it is reasonable to conclude that they could only be taken out of the port area in a vehicle. As the goods had to be loaded at some point within the port area it would seem to me that this could not easily have been done without active assistance of the port employees."

We have already said that By-law 91(1) has nothing to do with onus. It cannot shift onus which is on a bailee for reward to show that he is not negligent. What was said about applying the *contra proferentum* rule to By-law 91(1) in *Lee Heng's case*⁽¹²⁾ should be regarded as obiter as it was not necessary for the decision of that case. By-law 91(1) derives its power

A from the Port Authority Act which can in no way be construed to give any power to decide on burden. Thus, By-law 91(1) cannot assume to do what the Act itself is unable to do.

In this case the learned judge has dealt with the law in some details and gone through the evidence carefully. Appellants merely called two witnesses B DW1 and DW2 to show system and security. Both knew nothing about the missing goods, so they said nothing about them. Those who knew or were at the shed were not called. DW1 admitted that their out-turn was not accurate. Those working at Shed No. 8 should know about the goods as they were kept there. The men who conveyed the goods by forklift were also not called. That the 93 cases were deposited in C Shed No. 8 had been proved. They could not have been taken out without proper documents. A check would be made when the goods were being loaded onto a lorry. A second check would be made at the gate. Shed No. 8 was in the charge of a chief clerk with four clerks under him. They worked on shifts round D the clock. All these people were appellants' employees. DW2 had stated that some of his police officers were guilty of pilferage and of not signing beat book at times. He said he had no control over the regularity of marine police patrols. He said there was no alarm in the shed and agreed that dog patrol would be useful. It seems that the security aspect left much E to be desired. There should be more effective control and co-ordination.

The learned judge was in a better position to assess the credibility of the witnesses. The facts are such that we could not say that the learned judge was wrong to say at page 116 of the Appeal Record that:—

F "On the facts before me the irresistible inference that arises was that the goods might have been stolen as a consequence of the negligence of the servants of the Port Authorities in the course of their employment. I am even inclined to think that the theft might indeed have taken place through active participation or complicity of one or more of their employees."

Pilfering is inescapable in a port. Small packages G can easily be spirited out of a shed without anyone the wiser. Cases can be broken and goods extracted from them. The best system cannot ensure that no goods will be pilfered. But, when bulky and heavy goods kept on disappearing, something must be wrong somewhere. The 64 cases were bulky and weighed over 5 tons and required a forklift to convey them to the shed. Such a large quantity could not walk out H of the port by themselves. When some of the missing goods were known to have been found in a local firm the port authority should follow up with an investigation. They did nothing. In view of the frequent loss of bulky and heavy goods from the port the system and security must be assessed by the authority in the manner suggested by Sachs L.J. in *British Road Services Ltd. v. Arthur V. Crutchley & Co. Ltd.*⁽²⁷⁾ where he I said:—

"... in relation not merely to the risks of a particular 'outside job' such as the one under consideration, but also as regards other risks including those of an 'inside jobs', e.g. where a day employee facilitates the entry of others through some small door — a matter to which no evidence was directed."

Both Encik Puthuchear and Encik Abraham have done considerable researches judging by the way

they presented their submissions. We want to express our thanks to them as we have obtained much assistance from their researches. Encik Puthuchearry has presented various submissions carefully but we find that we are unable to accept them. We do not think in this case the learned judge has stated the law incorrectly and on the facts there is no reason to interfere with his finding against appellants.

We will now deal with the last ground on costs. Respondents (as plaintiffs) sued the Sanko Asia Line Ltd. (as first defendants) and appellants (as second defendants). The learned judge gave judgment in favour of respondents against appellants with costs. He also ordered appellants to pay costs to first defendants. Order of costs made in this manner is commonly known as a Sanderson Order. We think the learned judge did not make an order as in *Bullock v. The London General Omnibus Co. & Ors.*⁽²⁸⁾ commonly known as *Bullock Order* because it would involve double taxation resulting in added costs.

Appellants argued that respondents were entitled to first defendants' costs from appellants if first defendants were properly joined. First defendants were joined from the start but respondents adduced no evidence against them resulting thereby in the dismissal of the claim against first defendants. It was submitted that first defendants were not entitled to costs. On the other hand, respondents pointed out that they had to consider the question of limitation. They had to bring in first defendants because appellants gave them to understand that the 64 cases were shortlanded. Also, in their defence appellants denied ever receiving the missing goods. At first they refused even to accept the accuracy of the tally sheets but changed their minds later. In such a situation it was not only reasonable and advisable for respondents to join both as defendants but they would have been extremely unwise if they had not done so.

Costs are at the discretion of the court. So long as the court is shown to have exercised the discretion judicially the appellate court should not interfere lightly with such exercise. There is no ground for interference as the learned judge has acted properly in the exercise of his discretion.

For reasons given we would dismiss the appeal with costs here and in the court below.

Appeal dismissed.

Solicitors: *Skrine & Co.; Shearn, Delamore & Co.*

PORT SWETTENHAM AUTHORITY v. THE BORNEO CO. (MALAYSIA) SDN. BHD.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) March 8, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 109 of 1974]

Contracts — Bailment — Duties and responsibilities of bailee — Loss of goods after they were unloaded to wharf — Whether port authority liable — Burden of proof — Contract Act, 1950, ss. 104 and 105.

In this case it was shown that 173 cartons of teets and soothers were unloaded at Port Kelang and were in the custody

A of the appellants. The respondents managed to take delivery of only 70 cartons. The respondents obtained judgment for damages for the loss of the 103 cartons. The appellants appealed.

Held: (1) where a bailor and bailee relationship exists, then the position is the same as at common law, that is, the onus is on the bailee for reward to show that the loss of the goods was not due to his negligence:

B (2) in this case there was no reason for the appeal court to interfere with the finding of the learned trial judge that the appellants had not taken all reasonable care of the consignment in their custody.

Case referred to:-

(1) *Port Swettenham Authority v. T.W. Wu & Company (M) Sdn. Bhd.* [1975] 2 M.L.J. 73.

C FEDERAL COURT.

Abdullah bin Mohamad Yusof for the appellants.

P. Cumaraswamy for the respondents.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is another appeal by appellants against the decision of the same learned judge ordering them to pay damages in the sum of \$40,846.34 to respondents for the loss of 103 cartons of teets and soothers. In so far as points of law are concerned, appellants adopted the arguments made in *Port Swettenham Authority v. T.W. Wu & Company (M) Sdn. Bhd.*⁽¹⁾ The judgment of that case has just been delivered. Suffice to say that in upholding the decision of the learned judge we have expressed the view that where a bailor and bailee relationship exists then the position is the same as the common law, that is, the onus is on the bailee for reward to show that the loss of the goods was not due to his negligence.

F Except for the fact that the missing goods were not found the other facts of this case appear to be quite similar to that case, particularly the manner in which the missing goods disappeared. Respondents were consignees of 174 cartons of teets and soothers carried by Ex. S.S. "Pando Cape" from London on Bill of Lading arriving at Port Kelang on February 28, 1970. However, only 173 cartons were tallied and discharged. They were removed by forklifts to the godown by port employees. Respondents managed to take delivery of 70 cartons. The other 103 cartons could not be traced. Appellants maintained that they had received only 70 cartons which had been delivered to respondents. They submitted, in the alternative, that if the consignment was received by them in full, which they denied, the same was not removed from the port within the stipulated period. They denied they were negligent and relied on rule 93 of the Kelang Port Authority By-laws, 1965.

I Evidence adduced and accepted by the learned judge showed quite convincingly that 173 cartons of teets and soothers were taken by port employees and kept in Shed No. 7. He did not believe that appellants only received 70 cartons. Relevant documents indicated payments of customs duty and inward charges had been duly paid on the goods. On the production of these documents they were entitled to take delivery of the goods and appellants were dutybound to deliver such goods. Appellants could not produce the goods which were proved to have been delivered to their care and custody.